BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THOMAS F. HASTINGS	)	
Claimant	)	
	)	
VS.	)	
	)	
KANSAS EXPOCENTRE	)	
Respondent	)	Docket No. **1,062,292**
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the October 25, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. Frank D. Taff, of Topeka, Kansas, appeared for claimant. Karl L. Wenger, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the October 23, 2012, preliminary hearing transcript, with exhibits, October 19, 2012, deposition of Thomas Hastings with exhibits, and all pleadings contained in the administrative file.

ISSUES

The ALJ found claimant's accident of December 10, 2011, aggravated a preexisting condition in his right ankle. Therefore, under the provisions of K.S.A. 2011 Supp. 44-508, claimant's injury did not arise out of and in the course of employment.

Claimant requests review of whether the ALJ erred in finding claimant's accidental injury did not arise out of and in the course of his employment with respondent.

Respondent argues there is no medical record saying the accident on December 10, 2011, is the prevailing factor in claimant's injury, medical condition and resulting disability, and claimant has failed to sustain his burden of proof. Respondent further argues that claimant had preexisting conditions and intervening events. Therefore, respondent argues the ALJ's Preliminary Hearing Order should be affirmed.

The sole issue raised on review is whether claimant's accidental injury arose out of and in the course of employment.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the arguments of the parties, the undersigned Board Member finds:

Claimant was first hired by respondent in 2009 and worked to 2010. He was rehired on July 16, 2011. His job duties included janitorial work and setting up and tearing down events from 10 p.m. to 5:30 a.m. One of claimant's job duties was to retrieve a large trash container and haul it up on the elevator to the concourse level, where the concession stands are located and everyone can walk around to all the seating. The trash container weighed 300 to 320 pounds and was the size of a small car.

Claimant injured his right ankle on December 10, 2011, while pushing the large trash can. He described the accident as follows:

> After the game we had to do janitorial cleanup on our overnight shift. And I was taking the big gray trash can and wheeling it all the way around the concourse of the Expocentre. And I was picking up the trash and this happened about 5:00 -- probably 5:45 in the morning on Saturday morning before I got ready to go home and it [his right ankle] snapped then.[1]

After hearing his right ankle snap, claimant limped and then fell on the concrete floor. Claimant sought medical treatment at the St. Francis emergency room (ER). An x-ray was taken, and claimant was told he had a sprained ankle. Respondent referred claimant to its physician at Med-Assist on December 28, 2011. Claimant later sought treatment on his own with Dr. Ronald Carson.

Claimant contacted his boss to report his accident, and he left the ER records with the security guard. Claimant did not return to work until December 15th and 16th, from 5:30 p.m. to 10 p.m., when he worked at a hockey game. Claimant was not working for respondent or anyone else as of his deposition or the preliminary hearing. The last day claimant worked for respondent was December 16, 2011. Claimant said he quit his job with respondent on February 20, 2012.

Claimant has problems standing or walking for long periods of time because his heel hurts. Claimant testified that in June 2012, he fell down a flight of stairs at his apartment when his right ankle popped, snapped and gave out. He stated, "I was walking, getting ready to walk down the stairs and it popped and snapped and I fell down the stairs, so I

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[1] Hastings Depo. at 34-35.

went straight back to the ER."[2] Claimant testified he did not receive medical treatment at that time because he cannot afford it and he doesn't have a medical card.

Claimant testified that he stumbles a lot, wears a boot on his foot, and his right ankle and heel really hurt. He further testified he did not have any problems walking before his injury on December 10, 2011. Claimant is now having problems with his left foot. After putting all of his weight on his left foot, it popped.

From 2006 to 2008, claimant worked for PTMW, a steel and aluminum factory. His job was to caulk exteriors of the buildings and latex painting boards for the interior. While working at PTMW, claimant suffered a severely sprained right ankle. He said he was walking on concrete when his ankle just snapped. Claimant continued to have problems with his right ankle off and on. In his deposition, claimant testified that he first injured his right ankle in 2008 and that he had continuing symptoms until his accident in December 2011.

> Q. [by respondent's attorney] When you felt your ankle snap while you were working at PTMW, is it the same type of snap and pop that you heard on December 10th, 2011, when you were working at the Expocentre?
>
> A. [by claimant] Yes.
>
> Q. And it was in the same location?
>
> A. Yes.
>
> Q. How frequently have you heard the popping in your ankle since December 10th, 2011?
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> A. One too many times. I can't count. I can, but it's probably been over 50 times or more.[3]

Claimant testified at the preliminary hearing that although his ankle pain is in the same spot at it was in 2008, it is worse now.

Claimant also worked at the Resource Independent Living Center before going to work for respondent. He continued to have problems with his right ankle at least once a week while working at the Resource Independent Living Center. He would have sharp pains he would rate as a level 10.

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[2] *Id.* at 9.

[3] *Id.* at 22-23.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-508(h) provides:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(f) provides:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(2)(B) An injury by accident shall be deemed to arise out of employment only if: (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include: (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living; (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character; (iii) accident or injury which arose out of a risk personal to the worker; or (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-508(d) and (e) provides:

(d) "Accident" means an undesigned, sudden and unexpected *traumatic* event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. 'Accident' shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no

case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injuries may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

And K.S.A. 2011 Supp. 44-508(g) provides:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

The undersigned Board Member agrees with the ALJ's assessment that this case involved the aggravation of a preexisting injury and is not compensable under the 2011 amendments to the Kansas Workers Compensation Act (Act). Claimant's description of the injury is that he was walking on a concrete floor picking up trash and heard his ankle snap.

Claimant testified that he first injured his ankle playing football in high school. At that time he was treated by the team's athletic trainer. Shortly before his employment with PTMW ended in 2008, claimant suffered an ankle injury, the description of which is practically identical to this injury.

Claimant received treatment for his injury at PTMW and was placed on light duty due to the injury. Claimant testified that between the 2008 injury and the 2011 injury, he felt the same snapping and popping in his ankle approximately once a week with pain at the level of 10 out of 10 once per month. Claimant stated he did not seek medical treatment during this period, and he would suffer through it.

Because this injury occurred after May 15, 2011, the new standard applies with regard to the aggravation of a preexisting condition. The 2011 statutory changes to the Act state that "[a]n injury is not compensable solely[4] because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic."[5]

The Board has found accidental injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable, despite claimant also having an aggravation of a preexisting condition. Several prior decisions tend to show compensability where there is a demonstrated physical injury above and beyond a sole aggravation of a preexisting condition:

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[4] The word "solely" is not defined in the Kansas Workers Compensation Act. Solely is defined as "singly" or "[e]xclusively." *Poull v. Affinitas Kansas, Inc.*, No. 102,700, 228 P.3d 441 (Kansas Court of Appeals unpublished decision filed Apr. 8, 2010).

[5] K.S.A. 2011 Supp. 44-508(f)(2).

- A claimant's accident did not solely cause an aggravation of preexisting carpal tunnel syndrome when the accident also caused a triangular fibrocartilage tear.[6]

- A low back injury resulting in a new disk herniation and new radicular symptoms was not solely an aggravation of a preexisting lumbar condition.[7]

- A claimant's preexisting ACL reconstruction and mild arthritic changes in his knee were not solely aggravated, accelerated or exacerbated by an injury where his repetitive trauma resulted in a new finding, a meniscus tear, that was not preexisting.[8]

- An accident did not solely aggravate, accelerate or exacerbate claimant's preexisting knee condition where the court-ordered doctor opined the accident caused a new tear in claimant's medial meniscus.[9]

- Claimant had a prior partial ligament rupture, but a new accident caused a complete rupture, "a change in the physical structure" of his wrist, which was compensable.[10]

- A motor vehicle accident did not solely aggravate, accelerate or exacerbate claimant's underlying spondylolisthesis when the injury changed the physical structure of claimant's preexisting and stable spondylolisthesis.[11]

In all of these cases, claimant proved his or her accident was the prevailing factor in causing some new injury, medical condition and resulting disability. In this case, there is no evidence to support a finding that claimant did anything but aggravate a condition of long standing.

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[6] *Homan v. U.S.D. #259*, No. 1,058,385, 2012 WL 2061780 (Kan. WCAB May 23, 2012).

[7] *MacIntosh v. Goodyear Tire & Rubber Co.,* No. 1,057,563, 2012 WL 369786 (Kan. WCAB Jan. 31, 2012).

[8] *Short v. Interstate Brands Corp.*, No. 1,058,446, 2012 WL 3279502 (Kan. WCAB Jul. 13, 2012).

[9] *Folks v. State of Kansas*, No. 1,059,490, 2012 WL 4040471 (Kan. WCAB Aug. 30, 2012).

[10] *Ragan v. Shawnee County*, No. 1,059,278, 2012 WL 2061787 (Kan. WCAB May 30, 2012).

[11] *Gilpin v. Lanier Trucking Co.*, No. 1,059,754, 2012 WL 6101121 (Kan. WCAB Nov. 20, 2012).

Neither claimant nor respondent presented medical evidence that claimant's work activities were the prevailing factor causing claimant's right ankle injury or need for medical treatment. The medical records in evidence show claimant merely aggravated a preexisting injury.

CONCLUSION

This Board Member finds that claimant aggravated a preexisting condition and has failed to prove by a preponderance of the evidence that the incident at work on December 10, 2011, was the prevailing factor for his current need for workers compensation benefits.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[13]

WHEREFORE, the undersigned Board Member finds that the October 25, 2012 Preliminary Hearing Order entered by ALJ Rebecca A. Sanders is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Rebecca A. Sanders, Administrative Law Judge

[12] K.S.A. 44-534a.

[13] K.S.A. 2011 Supp. 44-555c(k).